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7 UNITED STATES OF AMERICA

8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,)	CRIMINAL CASE NO. 08cr1636 BEN
11 Plaintiff,)	Honorable Roger T. Benitez
12)	Courtroom 3
13)	Date: June 30, 2008
14)	Time: 2:00 p.m.
15)	
16)	UNITED STATES' RESPONSE AND OPPOSITION TO
17)	DEFENDANT'S MOTIONS:
18)	(1) TO PRODUCE DISCOVERY;
19)	(2) DISMISS INDICTMENT BASED ON THE
20)	MISINSTRUCTION OF THE GRAND JURY
21)	(3) FOR LEAVE TO FILE FURTHER MOTIONS;
22)	
23)	TOGETHER WITH STATEMENT OF FACTS,
24)	MEMORANDUM OF POINTS AND AUTHORITIES,
25)	AND THE UNITED STATES' MOTION FOR
26)	RECIPROCAL DISCOVERY.
27)	
28)	

21 COMES NOW the plaintiff, United States of America, by and through its counsel, Karen P.
22 Hewitt, United States Attorney, and Jeffrey D. Moore, Assistant United States Attorney, and hereby
23 files its Response and Opposition to defendant's above-referenced motions and files its Motion for
24 Reciprocal Discovery. This response is based upon the files and records of this case.

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I**STATEMENT OF THE CASE**

On May 21, 2008, a grand jury returned a two-count indictment charging Octavio Moreno-Reyna ("defendant") with Importation of Heroin and Possession of Heroin with the Intent to Distribute, in violation of Title 21 U.S.C. §§ 952 and 960, and 841(a)(1). On May 22, 2008, defendant was arraigned on the Indictment and entered a plea of not guilty.

II**STATEMENT OF FACTS**

On or about May 7, 2008, defendant entered the United States from Mexicali, Baja California, Mexico, through the pedestrian area of the Calexico West Port of Entry.^{1/} Around 7:45 am, defendant applied for entry in lane 3 and was questioned by Customs and Border Protection Officer Tarin. Defendant provided a negative customs declaration and handed Officer Tarin a birth certificate and California driver's license. At this time, defendant was referred to secondary inspection as part of a Random Enforcement Operation, called a "block blitz."

During secondary inspection, Officer Hernandez conducted a pat down search of defendant. As part of the search, defendant took off his shoes. Officer Hernandez thought that the shoes were heavier than normal and inspected them further. After further inspection, a package wrapped in brown tape was found in each of defendant's shoes. Officer Hernandez opened one of the packages and saw a black tar substance. The substance field tested positive for heroin. In all, .58 kg (1.27 lbs) of heroin was recovered from defendant's shoes.

Defendant was arrested and Mirandized. Defendant waived his rights and gave relatively extensive statement as indicated in the defense motion. During his statement, defendant admitted knowledge of an illegal substance in his shoes and that he was to transport it across the border.

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^{1/} Statement of Facts taken from the investigative reports relating to the instant case.

III**DEFENDANT'S DISCOVERY MOTIONS****A. Motion To Compel**

To date, the Government has produced 68 pages of discovery to defendant. This discovery includes the reports of the arresting agents, conviction documents, and defendant's criminal history rap sheets. In addition, 1 audio CD has been discovered to defendant.

The Government recognizes and acknowledges its obligation pursuant to Brady v. Maryland, 373 U.S. 83 (1963), the Jencks Act, and Rules 12 and 16 of the Federal Rules of Criminal Procedure. The Government has complied and will continue to comply with its discovery obligations going forward. To date, the Government has received no reciprocal discovery.

As to exculpatory information, the United States is aware of its obligations under Brady v. Maryland, 373 U.S. 83 (1963) and Giglio v. United States, 405 U.S. 150 (1972) and will comply. The United States will also produce any evidence of bias/motive, impeachment or criminal investigation of any of its witnesses of which it becomes aware. An inquiry pursuant to United States v. Henthorn, 931 F.2d 29 (9th Cir. 1991) will also be conducted.

The United States will provide a list of witnesses in its trial memorandum. The grand jury transcript of any person who will testify at trial will also be produced.

The United States has provided information within its possession or control pertaining to the prior criminal history of defendant. If the Government intends to offer any evidence under Rule 404(b) of the Federal Rules of Evidence, it will provide notice promptly to defendant. The United States will produce any reports of experts that it intends to use in its case-in-chief at trial or such reports as may be material to the preparation of the defense.

In sum, the Government has already produced charging documents, investigative reports, an audio CD, prior deportation and conviction documents, and defendant's criminal history rap sheets. To the extent defendant requests specific documents or types of documents, the Government will continue to disclose any and all discovery required by the relevant discovery rules. Accordingly, the Government respectfully requests that no orders compelling specific discovery by the United States be made at this time.

As there was nothing legally deficient with the instructions given to the January 2007 grand jury panel, defendant's motion to dismiss the indictment on this ground should be denied. Additionally, as defendant has only made a sketch argument challenging the grand jury instructions, the Government requests the right to provide more extensive briefing if the Court so desires.

B. Voir Dire Transcript of the Prospective January 2007 Grand Jurors.

In his moving papers, defendant has requested the voir dire transcript of the prospective 2007 grand jurors. (Def.'s Mot. 11-13.) If the Court feels that production of the transcript is warranted, the Government will produce the transcript in discovery.

C. Defendant's Motion to Produce the Grand Jury Transcript Should Be Denied.

Defendant seeks production of the grand jury transcript yet fails to support his motion with a showing of the requisite need to invade the sanctity of the grand jury's deliberations. (Def.'s Mot. 13-14.) As such, his motion should be denied.

The need for grand jury secrecy remains paramount unless the defendant can show "a particularized need" that outweighs the policy of grand jury secrecy. United States v. Walczak, 783 F.2d 852, 857 (9th Cir. 1986); United States v. Murray, 751 F.2d 1528, 1533 (9th Cir. 1985). The grand jury may indict someone based on inadmissible evidence or evidence obtained in violation of the rights of the accused.^{2/} Tracing the history of the grand jury from English common law, the U.S. Supreme Court has observed that grand jurors were not hampered by technical or evidentiary laws, and traditionally could return indictments based not on evidence presented to them at all, but on their own knowledge of the facts. See Costello v. United States, 350 U.S. 359, 363 (1956). In light of this tradition, the Court held that "neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act," and that grand jury indictments could not be challenged based on the insufficiency or incompetence of the evidence. Id.

^{2/} See, e.g., United States v. Mandujano, 425 U.S. 564 (1976) (indictment brought based on evidence obtained in violation of defendant's right against self-incrimination); United States v. Calandra, 414 U.S. 338, 343 (1974); United States v. Blue, 384 U.S. 251 (1966) (indictment brought based on evidence obtained in violation of defendant's right against self-incrimination); Lawn v. United States, 355 U.S. 339 (1958); Costello v. United States, 350 U.S. 359, 363 (1956) ("neither the Fifth Amendment nor any other constitutional provision prescribes the kind of evidence upon which grand juries must act"); see also Reyes v. United States, 417 F.2d 916, 919 (9th Cir. 1969); Johnson v. United States, 404 F.2d 1069 (9th Cir. 1968); Wood v. United States, 405 F.2d 423 (9th Cir. 1968); Huerta v. United States, 322 F.2d 1 (9th Cir. 1963).

1 Rather, “[a]n indictment returned by a legally constituted and unbiased grand jury, like an
 2 information drawn by the prosecutor, if valid on its face, is enough to call for trial of the charge on
 3 the merits.” *Id.* at 409.

4 In the instant case, there is no extraordinary basis to support defendant’s request for grand
 5 jury transcripts.

6 V

7 **DEFENDANT'S MOTION FOR LEAVE TO FILE ADDITIONAL MOTIONS**

8 The Government does not object to the granting of leave to file further motions as long as the
 9 further motions are based on newly discovered evidence or discovery provided by the Government
 10 subsequent to the instant motion at issue.

11 VI

12 **GOVERNMENT'S MOTION FOR RECIPROCAL DISCOVERY**

13 **A. All Evidence That Defendant Intends To Introduce In His Case-In-Chief**

14 Since the Government will honor defendant's request for disclosure under Rule 16(a)(1)(E),
 15 the Government is entitled to reciprocal discovery under Rule 16(b)(1). Pursuant to Rule 16(b)(1),
 16 requests that defendant permit the Government to inspect, copy and photograph any and all books,
 17 papers, documents, photographs, tangible objects, or make copies or portions thereof, which are
 18 within the possession, custody, or control of defendant and which defendant intends to introduce as
 19 evidence in her case-in-chief at trial.

20 The Government further requests that it be permitted to inspect and copy or photograph any
 21 results or reports of physical or mental examinations and of scientific tests or experiments made in
 22 connection with this case, which are in the possession and control of defendant, which he intends to
 23 introduce as evidence-in-chief at the trial, or which were prepared by a witness whom defendant
 24 intends to call as a witness. The Government also requests that the Court make such order as it
 25 deems necessary under Rules 16(d)(1) and (2) to ensure that the Government receives the reciprocal
 26 discovery to which it is entitled.

27 **B. Reciprocal Jencks – Statements By Defense Witnesses (Other Than Defendant)**

28 Rule 26.2 provides for the reciprocal production of Jencks material. Rule 26.2 requires

1 production of the prior statements of all witnesses, except a statement made by defendant. The time
2 frame established by Rule 26.2 requires the statements to be provided to the Government after the
3 witness has testified. However, to expedite trial proceedings, the Government hereby requests that
4 defendant be ordered to provide all prior statements of defense witnesses by a reasonable date before
5 trial to be set by the Court. Such an order should include any form in which these statements are
6 memorialized, including but not limited to, tape recordings, handwritten or typed notes and reports.

7
8 **VII**

9 **CONCLUSION**

10 For the foregoing reasons, the Government respectfully requests that defendant's motions be
11 denied except where not opposed, and the Government's motion for reciprocal discovery be granted.

12 DATED: June 23, 2008

Respectfully submitted,

13 KAREN P. HEWITT
14 United States Attorney

15 /s/ Jeffrey D. Moore
16 JEFFREY D. MOORE
17 Assistant U.S. Attorney
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Criminal Case No. 08cr1636 BEN
)
Plaintiff,)
) CERTIFICATE OF SERVICE
v.)
)
OCTAVIO MORENO-REYNA,)
)
)
Defendant.)
_____)

IT IS HEREBY CERTIFIED THAT:

I, Jeffrey D. Moore, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of GOVERNMENT'S RESPONSE AND OPPOSITION TO DEFENDANT'S MOTIONS on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. David Zugman

I hereby certify that I have caused to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

None

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on June 23, 2008.

s/ Jeffrey D. Moore
JEFFREY D. MOORE

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5 **UNITED STATES DISTRICT COURT**
6 **SOUTHERN DISTRICT OF CALIFORNIA**
7

8 UNITED STATES OF AMERICA,

9 Plaintiff,

10 v.

11 MANUEL MARTINEZ-COVARRUBIAS,

12 Defendant.

CASE NO. 07cr0491 BTM

**ORDER DENYING DEFENDANT'S
MOTION TO DISMISS THE
INDICTMENT**

13
14 Defendant Manuel Martinez-Covarrubias has filed a Motion to Dismiss the Indictment
15 Due to Erroneous Grand Jury Instruction. For the reasons discussed below, Defendant's
16 motion is **DENIED**.

17 **I. BACKGROUND**

18 On February 28, 2007, a federal grand jury empaneled in this district on January 11,
19 2007 returned a two-count Indictment charging Defendant with Importation of
20 Methamphetamine, in violation of 21 U.S.C. §§ 952 and 960, and Possession of
21 Methamphetamine with Intent to Distribute, in violation of 21 U.S.C. § 841(a)(1).
22

23 **II. CHALLENGED INSTRUCTIONS**

24 A. Video Presentation

25 Prior to the selection of the grand jury jury, the potential grand jurors were shown a
26 video titled "The Federal Grand Jury: The People's Panel." The video's apparent purpose
27 is to educate potential grand jurors about their civic duty to serve, the function of the grand
28 jury, and their responsibilities as grand jurors.

1 The video presents the story of a woman who serves on a grand jury for the first time.
2 In one scene, after the woman receives the summons, her son tells her what he has learned
3 about the function of a grand jury. Reading from a civics book, the son states that if the “jury
4 finds that probable cause does exist, then it will return a written statement of charges called
5 an indictment”

6 When charging the impaneled grand jury, the fictional judge explains that if the grand
7 jury finds that there is probable cause, “you will return an indictment.”

8 Later, the foreperson tells the other grand jurors that there are two purposes of the
9 grand jury: (1) when there is a finding of probable cause, to bring the accused to trial fairly
10 and swiftly; and (2) to protect the innocent against unfounded prosecution.

11
12 B. Voir Dire Session

13 Before commencing voir dire, the empaneling judge, the Hon. Larry A. Burns,
14 explained the function of the grand jury to the prospective jurors as follows: “The grand jury
15 is determining really two factors: ‘Do we have a reasonable – collectively, do we have a
16 reasonable belief that a crime was committed? And second, do we have a reasonable belief
17 that the person that they propose that we indict committed the crime?’ If the answer is ‘yes’
18 to both of those, then the case should move forward. If the answer to either of the questions
19 is ‘no,’ then the grand jury should hesitate and not indict.” App. 2 to Gov’t Response at 8.

20 During voir dire, Judge Burns explained to the potential grand jurors that the
21 presentation of the evidence to the grand jury was going to be one-sided. Id. at 14.
22 However, Judge Burns stated, “Now, having told you that, my experience is that the
23 prosecutors don’t play hide-the-ball. If there’s something adverse or that cuts against the
24 charge, you’ll be informed of that. They have a duty to do that.” Id. at 14-15.

25 One prospective juror, a retired clinical social worker, indicated that he did not believe
26 that any drugs should be considered illegal. Id. at 16. He also stated that he had strong
27 feelings about immigration cases and thought the government was spending a lot of time
28 unnecessarily persecuting people. Id. The following exchange occurred:

1 The Court: Now, the question is can you fairly evaluate those cases? Just as
 2 the Defendant ultimately is entitled to a fair trial and the person that's accused
 3 is entitled to a fair appraisal of the evidence of the case that's in front of you,
 4 so, too, is the United States entitled to a fair judgment. If there's probable
 5 cause, then the case should go forward. I wouldn't want you to say, "Well,
 6 yeah, there's probable cause. But I still don't like what our Government is
 7 doing. I disagree with these laws, so I'm not going to vote for it to go forward."
 8 If that's your frame of mind, then probably you shouldn't serve. Only you can
 9 tell me that.

10 Prospective Juror: Well, I think I may fall in that category.

11 The Court: In the latter category?

12 Prospective Juror: Yes.

13 The Court: Where it would be difficult for you to support a charge even if you
 14 thought the evidence warranted it?

15 Prospective Juror: Yes.

16 The Court: I'm going to excuse you, then. I appreciate your honest answers.

17 Id. at 16-17.

18 Later, another prospective juror, a real estate agent, expressed a concern regarding
 19 the disparity between state and federal law with respect to medical marijuana. Judge Burns
 20 responded:

21 Well, those things – the consequences of your determination shouldn't concern
 22 you in the sense that penalties or punishment, things like that – we tell trial
 23 jurors, of course, that they cannot consider the punishment or the
 24 consequence that Congress has set for these things. We'd ask you to also
 25 abide by that. We want you to make a business-like decision and look at the
 26 facts and make a determination of whether there was a [sic] probable cause.

27 Id. at 25.

28 Subsequently, the prospective juror stated that he felt that drugs should be legal and
 that rapists and murderers, not people using drugs, should go to jail. Id. at 25-26. The
 following exchange ensued:

The Court: I think rapists and murderers ought to go to jail too. It's not for me
 as a judge to say what the law is. We elect legislators to do that. We're sort
 of at the end of the pipe on that. We're charged with enforcing the laws that
 Congress gives us.

I can tell you sometimes I don't agree with some of the legal decisions
 that are indicated that I have to make. But my alternative is to vote for
 someone different, vote for someone that supports the policies I support and
 get the law changed. It's not for me to say, "Well, I don't like it. So I'm not
 going to follow it here."

You'd have a similar obligation as a grand juror even though you might

1 have to grit your teeth on some cases. Philosophically, if you were a member
2 of congress, you'd vote against, for example, criminalizing marijuana. I don't
know if that's it but you'd vote against criminalizing some drugs.

3 That's not what your prerogative is here. Your prerogative instead is to
4 act like a judge and to say, "All right. This is what I've got to deal with
objectively. Does it seem to me that a crime was committed? Yes. Does it
5 seem to me that this person's involved? It does." And then your obligation, if
you find those things to be true, would be to vote in favor of the case going
forward.

6 I can understand if you tell me, "Look, I get all that, but I just can't do it
or I wouldn't do it." I don't know what your frame of mind is. You have to tell
me about that.

7 Prospective Juror: I'm not comfortable with it.

8 The Court: Do you think you'd be inclined to let people go on drug cases even
9 though you were convinced there was probable cause they committed a drug
offense?

10 Prospective Juror: It would depend upon the case.

11 The Court: Is there a chance that you would do that?

12 Prospective Juror: Yes.

13 The Court: I appreciate your answers. I'll excuse you at this time.

14 Id. at 26-28.

15 Later, a potential juror said that he was "soft" on immigration because he had done
16 volunteer work with immigrants in the field, but that he could be fair and objective. Judge
17 Burns stated: "As you heard me explain earlier to one of the prospective grand jurors, we're
18 not about trying to change people's philosophies and attitudes here. That's not my business.
19 But what I have to insist on is that you follow the law that's given to us by the United States
20 Congress. We enforce the federal laws here." Id. at 61. This juror was not excused.

21 C. Charge to Impaneled Grand Jury

22 After the grand jury was impaneled, Judge Burns gave further instructions regarding
23 the responsibilities of the grand jurors.

24 With respect to the enforcement of federal laws, Judge Burns explained:

25 But it's not for you to judge the wisdom of the criminal laws enacted by
26 Congress; that is, whether or not there should be a federal law or should not
27 be a federal law designating certain activity is [sic] criminal is not up to you.
That's a judgment that Congress makes.

28 And if you disagree with that judgment made by Congress, then your

option is not to say, 'Well, I'm going to vote against indicting even though I think that the evidence is sufficient' or 'I'm going to vote in favor of [indictment] even though the evidence may be insufficient.' Instead, your obligation is to contact your congressman or advocate for a change in the laws, but not to bring your personal definition of what the law ought to be and try to impose that through applying it in a grand jury setting.

Furthermore, when you're deciding whether to indict or not to indict, you shouldn't be concerned with punishment that attaches to the charge. I think I also alluded to this in the conversation with one gentleman. Judges alone determine punishment. We tell trial juries in criminal cases that they're not to be concerned with the matter of punishment either. Your obligation at the end of the day is to make a business-like decision on facts and apply those facts to the law as it's explained and read to you.

App. 1 to Gov't Response at 8-9.

With respect to exculpatory evidence, Judge Burns stated: "As I told you, in most instances, the U.S. Attorneys are duty-bound to present evidence that cuts against what they may be asking you to do if they're aware of that evidence." Id. at 20. Later, Judge Burns said, "If past experience is any indication of what to expect in the future, then you can expect that the U.S. Attorneys that will appear in front of you will be candid, they'll be honest, that they'll act in good faith in all matters presented to you." Id. at 27.

III. DISCUSSION

A. Instructions Re: Role of Grand Jury

Defendant contends that statements made in the video, Judge Burns' instructions, and the dismissal of two potential jurors deprived Defendant of the traditional functioning of the Grand Jury. Specifically, Defendant claims that the challenged statements in combination with the dismissal of the two potential jurors "flatly prohibited grand jurors from exercising their constitutional discretion to not indict even if probable cause supports the charge." (Def.'s Reply Br. 8.) Looking at the video presentation and the instructions as a whole, the Court disagrees.

Judge Burns made it clear that the jurors were not to refuse to indict in the face of probable cause *on the ground that they disagreed with Congress's decision to criminalize certain activity*. Judge Burns did not err in doing so. In United States v. Navarro-Vargas, 408

1 F.3d 1184 (9th Cir. 2005) (“Navarro-Vargas II”), the Ninth Circuit upheld the model grand jury
 2 instruction that states: “You cannot judge the wisdom of the criminal laws enacted by
 3 Congress, that is, whether or not there should or should not be a federal law designating
 4 certain activity as criminal. That is to be determined by Congress and not by you.” The
 5 majority opinion observed that the instruction was not contrary to any long-standing historical
 6 practice surrounding the grand jury and noted that shortly after the adoption of the Bill of
 7 Rights, federal judges charged grand juries with a duty to submit to the law and to strictly
 8 enforce it. *Id.* at 1193, 1202-03. “We cannot say that the grand jury’s power to judge the
 9 wisdom of the laws is so firmly established that the district court must either instruct the jury
 10 on its power to nullify the laws or remain silent.” *Id.* at 1204.

11 A prohibition against judging the wisdom of the criminal laws enacted by Congress
 12 amounts to the same thing as a prohibition against refusing to indict based on disagreement
 13 with the laws. It is true that Judge Burns used stronger language that, viewed in isolation,
 14 could be misconstrued as requiring the return of an indictment in *all* cases where probable
 15 cause can be found. Particularly troubling is the following statement made to the real estate
 16 agent: “Your prerogative instead is to act like a judge and to say, ‘All right. This is what I’ve
 17 got to deal with objectively. Does it seem to me that a crime was committed? Yes. Does
 18 it seem to me that this person’s involved? It does.’ *And then your obligation*, if you find
 19 those things to be true, *would be to vote in favor of the case going forward.*” App. 2 to Gov’t
 20 Response at 26. However, viewed in context, Judge Burns was not mandating the issuance
 21 of an indictment in *all* cases where probable cause is found; he was explaining that
 22 disagreement with the laws should not be an obstacle to the issuance of an indictment.¹

23 Furthermore, the word “obligation” is not materially different than the word “should.”

24
 25 ¹ The Supreme Court has recognized that a grand jury is not required to indict in
 26 every case where probable cause exists. In *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986),
 27 the Supreme Court explained: “The grand jury does not determine only that probable cause
 28 exists to believe that a defendant committed a crime, or that it does not. In the hands of the
 grand jury lies the power to charge a greater offense or a lesser offense; numerous counts
 or a single count; and perhaps most significant of all, a capital offense or a noncapital offense
 - all on the basis of the same facts. Moreover, ‘[t]he grand jury is not bound to indict in every
 case where a conviction can be obtained.’ *United States v. Ciambrone*, 601 F.2d 616, 629
 (2d Cir. 1979) (Friendly, J., dissenting).”

1 In Navarro-Vargas II, the majority opinion held that the model instruction that the jurors
 2 “should” indict if they find probable cause does not violate the grand jury’s independence.
 3 The majority explained, “As a matter of pure semantics, it does not ‘eliminate discretion on
 4 the part of the grand jurors,’ leaving room for the grand jury to dismiss even if it finds
 5 probable cause.” Navarro-Vargas II, 408 F.3d at 1205 (quoting United States v. Marcucci,
 6 299 F.3d 1156, 1159 (9th Cir. 2002)). The dissenting opinion notes that the word “should”
 7 is used “to express a duty [or] *obligation*.” *Id.* at 1121 (quoting The Oxford American Diction
 8 And Language Guide 931 (1999))(emphasis added).²

9 Defendant points to the language in the video where first the son, then the judge, state
 10 that if there is a finding of probable cause, the grand jury “will” return an indictment.
 11 However, no emphasis is placed on the word “will.” As spoken by the actors, the statements
 12 are not directives, mandating the return of an indictment upon the finding of probable cause,
 13 but, rather, descriptions of what is expected to occur. Similarly, the foreperson’s statement
 14 that one of the purposes of the grand jury is to bring an accused to trial when there is a
 15 finding of probable cause is a general statement of the grand jury’s function, not a command
 16 to return an indictment in *every* case where probable cause exists.

17 Defendant also argues that Judge Burns improperly forbade the grand jury from
 18 considering the potential punishment for crimes when deciding whether or not to indict.
 19 Defendant relies on the following statement:

20 Well, those things – the consequences of your determination shouldn’t concern
 21 you in the sense that penalties or punishment, things like that – we tell trial
 22 jurors, of course, that they cannot consider the punishment or the
 23 consequence that Congress has set for these things. *We’d ask you to also*
abide by that. We want you to make a business-like decision and look at the
 facts and make a determination of whether there was a probable cause.

24 App. 2 to Gov’t Response at 25. (Emphasis added.) Although Judge Burns stated that trial
 25 jurors *cannot* consider punishment, he did not impose such a restriction on the grand jurors.
 26 Instead, Judge Burns *requested* that the grand jurors follow the same principle. Similarly,

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 28 ² Defendant concedes that at other times Judge Burns instructed that upon a finding
 of probable cause, the case “should” go forward. App. 2 to Gov’t Response at 8, 17; App.
 1 to Gov’t Response at 4, 23.

1 during the formal charge, Judge Burns stated, “[y]ou *shouldn’t* be concerned with punishment
2 that attaches to the charge.” App. 1 to Gov’t Response at 8. (Emphasis added.)

3 In United States v. Cortez-Rivera, 454 F.3d 1038 (9th Cir. 2006), the Ninth Circuit
4 upheld a jury instruction that stated: “[W]hen deciding whether or not to indict, you *should not*
5 be concerned about punishment in the event of conviction; judges alone determine
6 punishment.” (Emphasis added.) Consistent with the reasoning in Marcucci and Navarro-
7 Vargas II, the Ninth Circuit held that the instruction did not place an absolute bar on
8 considering punishment and was therefore constitutional. The instructions given by Judge
9 Burns regarding the consideration of punishment were substantially the same as the
10 instruction in Cortez-Rivera.

11 Neither Judge Burns nor the video pronounced a general prohibition against jurors
12 exercising their discretion to refuse to return an indictment in the face of probable cause.
13 In any case, “history demonstrates that grand juries do not derive their independence from
14 a judge’s instruction. Instead they derive their independence from an unreviewable power
15 to decide whether to indict or not.” Navarro-Vargas II, 408 F.3d at 1204.

16 Both the video and Judge Burns informed the jurors about the utmost secrecy of the
17 grand jury proceedings and their deliberations. The video and Judge Burns also emphasized
18 to the jury that they were independent of the Government and did not have to return an
19 indictment just because the Assistant U.S. Attorney asked them to. In the video, the judge
20 expressed approval at the fact that the grand jury did not return an indictment as to the
21 alleged driver of the get-away car. Judge Burns characterized the jury as “a buffer between
22 our Government’s ability to accuse someone of a crime and then putting that person through
23 the burden of standing trial.” App. 1 to Gov’t Response at 26. Judge Burns also told the
24 jurors that they were not to be a “rubber stamp” and were expected to depend on their
25 independent judgment. Id. at 27.

26 Even though the jurors were not explicitly instructed that they could use their
27 discretion to refuse to return an indictment, they retained that power by virtue of the secrecy
28 surrounding their deliberations and the unreviewability of their decisions. Nothing that Judge

1 Burns said or did impinged on the jurors' independence in this regard.

2 Defendant counters that the dismissal of the two potential jurors undermined the grand
3 jury's independence from the very start. According to Defendant, when Judge Burns
4 dismissed the jurors, the message was clear that they were to indict in every case where
5 there was probable cause or they would be excused. Defendant contends that the remaining
6 grand jurors could not have understood Judge Burns' actions in any other way. (Reply Br.
7 18.) The Court disagrees.

8 Upon reading the voir dire transcript, it is apparent that the jurors were excused
9 because they were biased against the government with respect to a whole category of
10 criminal laws, not simply because they were independent-minded and might refuse to return
11 an indictment in a case where probable cause exists. Judge Burns explained to the clinical
12 social worker, "We're all products of our experience. We're not going to try to disabuse you
13 of experiences or judgments that you have. What we ask is that you not allow those to
14 control invariably the outcome of the cases coming in front of you; that you look at the cases
15 fresh, you evaluate the circumstances, listen to the witness testimony, and then make an
16 independent judgment." App. 2 to Gov't Response at 15. Judge Burns excused the social
17 worker after he admitted that it would be difficult for him to return an indictment in drug or
18 immigration cases.

19 Similarly, the real estate agent expressed that he thought drugs should be legal and
20 that people using drugs should not be sent to jail. App. 2 to Gov't Response at 25-26. The
21 real estate agent said that he was not comfortable with indicting in drug cases. Although he
22 did not say that he would refuse to indict in all cases involving drugs, he admitted that
23 because of his beliefs, there was a chance that he would refuse to return an indictment in a
24 drug case even though there was probable cause. Id. at 27. The real estate agent's
25 responses established that he had serious concerns regarding the criminalization of drugs
26 and could not be impartial with respect to these cases

27 That bias was the reason for the dismissal of the first two potential jurors is confirmed
28 by the dismissal of a third potential juror. This juror stated that he had a strong bias for the

1 Government. App. 2 to Gov't Response at 38. Judge Burns cautioned the juror that he
2 should not "automatically defer to [the Government] or surrender the function and give the
3 indictment decision to the U.S. Attorney. You have to make that independently." Id. at 40.
4 Judge Burns emphasized once again the responsibility of the jurors to evaluate the facts of
5 each case independently based on the evidence presented. Id. at 42-43. Demonstrating his
6 even-handedness, Judge Burns explained, "I'm equally concerned with somebody who would
7 say, 'I'm going to automatically drop the trap door on anybody the U.S. Attorney asks.' I
8 wouldn't want you to do that." Id. at 44.

9 A reasonable grand juror would not have interpreted the dismissal of the first two
10 potential jurors as a message that they must indict in all cases where probable cause is
11 found or risk being excused from service. It was apparent to the other jurors that a lack of
12 impartiality with respect to certain types of cases, *not* independence, was the reason for all
13 three dismissals.

14 In sum, Judge Burns did not err in instructing the grand jurors that they were not to
15 refuse to return an indictment on the ground that they disagreed with the laws. Furthermore,
16 nothing in the video or Judge Burns' instructions nullified the grand jury's inherent power to
17 refuse to indict for any reason whatsoever. As the Ninth Circuit noted in Navarro-Vargas II,
18 408 F.3d at 1204, the grand jury's independence results from the secrecy of their
19 deliberations and the unreviewability of their decisions. Nothing in the record shows any
20 impediment to that independence.

21
22 B. Instructions re: Assistant U.S. Attorneys

23 Defendant also contends that Judge Burns committed structural error by making
24 comments about the Assistant U.S. Attorney's duty to present evidence that "cuts against the
25 charge." According to Defendant, not only did Judge Burns' comments contradict United
26 States v. Williams, 504 U.S. 36 (1992), but also discouraged independent investigation,
27 leading to inaccurate probable cause determinations. Defendant reasons that given Judge
28 Burns' comments, the grand jurors would have assumed that if the prosecutor did not present

1 any exculpatory evidence, then none exists, rendering further investigation a waste of time.

2 Under Williams, prosecutors do not have a duty to present substantial exculpatory
3 evidence to the grand jury. Although Assistant U.S. Attorneys apparently have an
4 employment duty to disclose “substantial evidence that directly negates the guilt” of a subject
5 of investigation (United States Attorneys’ Manual § 9-11.233), it does not appear that they
6 have a broad duty to disclose all evidence that may be deemed exculpatory or adverse to
7 the Government’s position.

8 Accordingly, Judge Burns’ comments regarding the duty of Assistant U.S. Attorneys
9 to present adverse evidence were inaccurate. However, Judge Burns’ comments do not rise
10 to the level of structural error. As discussed above, the video and Judge Burns stressed that
11 the grand jury was independent of the Government. The video and Judge Burns also
12 explained to the jury that they could direct the Assistant U.S. Attorney to subpoena additional
13 documents or witnesses. App. 1 to Gov’t Response at 11, 24. The jurors were also told
14 about their right to pursue their own investigation, even if the Assistant U.S. Attorney
15 disagrees with the grand jury’s decision to pursue the subject. Id. at 12.

16 In light of the foregoing instructions, the Court does not agree that the grand jurors
17 would assume that if the Government did not present any exculpatory evidence, none exists.
18 A reasonable juror would understand that the Assistant U.S. Attorney may not be aware of
19 certain exculpatory evidence, whether due to legitimate circumstances or inadequate
20 investigation, and that further investigation by the grand jury may be needed to properly
21 evaluate the evidence before them. Furthermore, Judge Burns told the jury that “in *most*
22 instances” the U.S. Attorneys are duty-bound to present exculpatory evidence. App. 1 to
23 Gov’t Response at 20. Based on this qualifying language, the grand jurors would have
24 understood that the prosecutor is not always bound to present exculpatory evidence. Thus,
25 “the structural protections of the grand jury” have not “been so compromised as to render the
26 proceedings fundamentally unfair.” Bank of Nova Scotia v. United States, 487 U.S. 250, 257
27 (1988).

28 If Defendant can establish that the Government in fact knew of exculpatory evidence

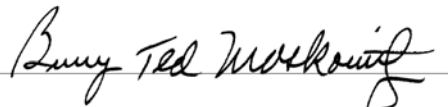
1 that was not presented to the grand jury and that this failure to present exculpatory evidence,
2 in conjunction with Judge Burns' comments, "substantially influenced the grand jury's
3 decision to indict" or raises "grave doubt" that the decision to indict was free from the
4 substantial influence of such events, the Court may dismiss the indictment under its
5 supervisory powers. Bank of Nova Scotia, 487 U.S. at 256. Therefore, the Court will grant
6 Defendant leave to conduct discovery regarding what evidence was presented to the grand
7 jury. If, based upon the discovery, Defendant can establish that he suffered actual prejudice,
8 Defendant may renew his motion to dismiss the indictment.

9
10 **IV. CONCLUSION**

11 For the reasons discussed above, Defendant's Motion to Dismiss the Indictment Due
12 to Erroneous Grand Jury Instruction is **DENIED WITHOUT PREJUDICE**.

13
14 **IT IS SO ORDERED.**

15 DATED: October 11, 2007

16 
17
18 Honorable Barry Ted Moskowitz
United States District Judge